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EXAMINER
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FRANK, RODNEY T

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/621,860  
Filing Date: July 16, 2003  
Appellant(s): WEISENBERGER ET AL.

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For Appellant  
Thomas E. Brown

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 16 November 2009 appealing from the Office action mailed 15 October 2008.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

6,340,892	RYNHART ET AL	01-2002
2003/0040934	SKIDMORE ET AL.	02-2003

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 103***

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1, 5-11, 13-18, 27-30, 35, and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rynhart et al., in view of Skidmore et al.

3. Rynhart et al. (U.S. Patent Number 6,340,892; hereinafter referred to as Rynhart). Rynhart discloses that a moisture meter (1) includes an LCD display (8) driven by a digital microcontroller (50) which generates digital moisture reading data. Readings are stored as discrete records in files. The microcontroller (51) stores a library of material data and automatically compensates signals from a capacitive/impedance sensor circuit (51) according to both stored material parameter values and sensed temperature. Users may edit the parameter values. A non-removable cover (4) is used at the final stage of production to configure the meter for the nature of interfacing (such as serial port interfacing) required (Please see the abstract). Rynhart discloses a meter/sensor that is capable of measuring the moisture content of various structures. Rynhart also discloses that the data obtained by the sensor can be printed out via Microsoft Suite (i.e. Excel) software. While this would give us a printout of the moisture content data, there is no specific teaching of utilizing such data as a certificate given for reporting results of a home inspection. Skidmore et al. (U.S. Patent Application Publication Number 2003/0040934; hereinafter referred to as Skidmore) discloses a system directed to the automated generation of a home

inspection report according to home inspection information gathered from a home inspector during the inspection of a home. The disclosure is directed to the subsequent creation of a home warranty insurance policy created according to the home inspection information so that a customized home warranty inspection policy based upon the home inspection information is provided (Please see the abstract). Skidmore discloses in paragraph [0020] that the interior of a building is measured during a home inspection and the data from these measurements is recorded and stored. The examiner would like to point out that the interior of a structure would include the ceilings, floor, walls, and other key areas of interest in a room. Further yet, the examiner would like to point out that while the prior art does not explicitly teach taking measurement around a door frame or window frame, it would be obvious to one of ordinary skill in the art to test for moisture levels around these areas since they are a likely source of potential moisture intrusion. Paragraph [0019] specifically addresses that instead of a whole inspection, only certain aspects, such as moisture issues, can be addressed and tested. Paragraph [0001] discloses that the data obtained can be formatted into a report and paragraph [0008] specifically discloses the ability to have data turned into a specific format, such as a form/certificate.

4. In regard to claims 1, and 11, Rynhart discloses a method and system for certifying at least a portion of structural components of an interior of a structure relative to moisture content, comprising the steps of: measuring moisture content levels within structural components of said portion of the interior of the structure; and providing data and results regarding moisture content level measurements. Figure 10, for example

outlines the various types of wood, wall materials, and roofing materials that can be measured. However, the data that can be produced by Rynhart is not specifically referred to as a "certificate".

Upon reading the specification in order to gain a better insight as to what the "certificate" being issued meant, it is determined that the certificate is a document or report that is given upon the completion of a moisture test to determine whether a particular structure passed or failed the test based upon given parameters (page 2 line 33 through page 4 line 3 of the applicants specification, for example). In the Rynhart reference, moisture content is determined (see column 1 lines 25 and 26) for structural components of the interior of a structure (see column 2 line 65 through column 3 line 2). Then, since the certificate is a document that gives information regarding the results for the moisture test, Rynhart discloses beginning in column 6 with line 66 and continuing through column 7 line 2 discloses the use of Microsoft Office software can be used to obtain the generated data. Skidmore specifically address the ability to translate home inspection data obtained into a usable format, such as a report or certificate of compliance or failure, based upon the results obtained. As discussed earlier, the Rynhart reference makes measurements, but it does not disclose doing anything very useful with the information. Therefore, one would be motivated to modify Rynhart by giving a method of making the Rynhart data useful, as disclosed in Skidmore. In the home inspection method disclosed in Skidmore, a method of obtaining various measurements during a home inspection to produce a report or certificate with relation to findings of moisture content is disclosed. Therefore, it would be obvious at the time

of the invention to utilize Rynhart as a device to make measurements during a home inspection such as to obtain moisture data and utilizing said obtained data in the method of disclosed in Skidmore in order to obtain a certificate reporting the results of said moisture measurements.

In reference to claims 5-9, 14-18, 27, and 28 though the specific structure under test is not specifically disclosed in Rynhart, the reference discloses in column 1, lines 1 through 18 that the device is used for surveying and it has an advantage of being used in environments such as attic spaces. Since an attic is usually associated with a house and surveying is also used, amongst other things, during home inspection, the terminology used would refer to a structure that would meet the description of a "building". However, in view of the Skidmore reference being specific to home inspection and paragraph [0020] of Skidmore disclosing similar items of interest as Rynhart to be measured, then the use during a home inspection is viewed as obvious to one of ordinary skill in the art.

In reference to claims 10, 13, 29, and 30, though the specific percentage value that is desired is not specifically disclosed, official notice is taken that the percentages used to determine the moisture compliance or failure is a well established parameter in the building industry as the percentage of moisture content that can produce mold is found in many documents relating to home inspection and building. For example, an article from the Department of Wood and Paper Science; Housing and Clothing at the University of Minnesota entitled "Testing Housing Materials for Moisture" it states that if moisture content is measured to be less than 10%, then there is no need to worry, while

a reading above 20% could indicate a serious moisture problem (this can also be found on line at the following internet address: <http://www.extension.umn.edu/info-u/household/BK270.html>). Therefore, these percentage parameters are viewed as knowledge well within the preview of one of ordinary skill in the art.

In reference to claims 35 and 36, the issuance of any compliance or failure criteria would be a part of a home inspection and during said inspection, moisture content levels are measured and an assessment of compliance or failure is determined and reported. This inspection method and means is disclosed in the Skidmore reference, and thus the issuance of a certificate is deemed to be disclosed as well.(10)

#### **Response to Argument**

Applicant's arguments filed 16 November 2009 have been fully considered but they are not persuasive. The applicant has submitted arguments on pages 4-11 of the appeal brief. The applicant first argues that the Rynhart reference does not teach the claimed subject matter of independent claims 1 and 11, and then argues that the Skidmore reference does not disclose the claimed subject matter of claims 1 and 11. These arguments are not persuasive.

With regard to the reinstatement of the Rynhart reference, the applicant would like to point out that in the office action dated 14 August 2006, the examiner rejected the claims based upon the Rynhart reference alone under 35 U.S.C. 103. In the response dated February 13, 2007, the applicant amended the claims to include the limitations of making measurements about various portions of the interior of a structure such as a window frame, door frame, etc. Thus, the Rynhart reference was applied alone as a

reference to different claims than presently presented. In contrast, the examiner has currently applied a combination of references, said combination being Rynhart further in view of Skidmore. Thus, as a combination of references is used, this rejection is actually a completely different rejection than the one that was responded to in February of 2007, and thus cannot be viewed as "without merit" as stated on page 3, in the second paragraph of the response. This new rejection utilizing a combination of references should be viewed as a new rejection of the claims and simply approaching the present rejection utilizing a combination of references as the same rejection as a single reference alone is inappropriate on the part of the applicant. For at least this reason, the applicant arguments are not persuasive.

With regard to the arguments of the Rynhart reference individually, as seen on pages 5 through 7 of the arguments, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). With this in mind, the applicant argues that Rynhart is not concerned with the features of claim 1, namely a measuring step measuring a plurality of moisture content levels within said interior portion of the structure; determining if each of said plurality of moisture content levels is within a desired level; and issuing a moisture level compliance certificate if the result of said determining step is that each of said plurality of moisture content levels is below the desired level; wherein said measuring step includes taking measurements of said moisture content levels around at least one window frame and at least one door frame,

and along at least one floor, at least one wall and at least one ceiling, all of which are included within said interior portion of said structure, Rynhart discloses that he has a device that can take measurements of moisture content, said measurements being made for a variety of materials as disclosed in figure 10 of Rynhart. The materials indicated are various woods, walls and wall materials such as plaster, brick, or drywall, and roofing material. The examiner submits that one of ordinary skill in the art at the time of the inventions would be able to utilize the Rynhart device to make measurements on the inside of a structure. Since most buildings are wood frame buildings wherein a said wood frame is covered on the interior by plaster and drywall in order to make up the walls and rooms of a building, then the indication of the measurements of moisture content of such materials in the Rynhart reference makes it of particular relevance to the presently claimed invention. Further still, with respect to making such measurements at particular points such as window and door frames, ceilings, floors, etc., the applicant has not shown anywhere in the specification where these measurements are not a typical measurement process known in the art. In other words, there is no disclosure of any new method of performing moisture measurements for a home inspection, simply a method of taking these measurements and presenting them in a particular format of a compliance certificate. Thus, the measurement points would be obvious to one of ordinary skill in the art at the time of the invention, specifically since any openings such as a window or door would be of particular interest since they would be a prime location for possible moisture intrusion. The Rynhart device is very similar in operation and function to the GE MMS Plus Moisture

measurement system which is disclosed to be used in the present specification of page 4 as well as disclosed by the applicant to be used per the demonstration during the personal interview with the examiner on 25 July of 2006. The examiner sees the Rynhart reference as a functional equivalent to the GE MMS Plus meter disclosed by the applicant. How it is not obvious to one of ordinary skill in the art to utilize a device for its intended purpose of making moisture measurements is not clear to the examiner. Further, the applicant's disregard of what is taught by the combination of the references causes the arguments to not be persuasive. The examiner will not address the assertions concerning the lack of teachings or evidence in the Rynhart reference, since this is not the rejection that was made, and thus is not the issue on appeal. The issue on appeal is whether or not the rejection based upon Rynhart in view of Skidmore teaches or otherwise renders obvious the presently claimed invention. This issue has not even been addressed by the applicant at this time. In particular, the applicant has requested a withdrawal of the rejection based on Rynhart. The examiner cannot withdraw a rejection based on Rynhart because there is not presently any rejection based on Rynhart. Since the applicant has not requested a withdrawal of therejection on Rynhart in view of Skidmore, then the examiner is left to assume that the rejection is valid.

With regard to the arguments of the Skidmore reference alone, as presented on pages 7 through 11 of the present arguments and response, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA

1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). With this in mind, Skidmore is a specific system of providing a home inspection and home warranty, said inspection specifically includes the performance of a moisture level evaluation (see paragraph [0019]). A database of all home inspection components is stored and a final report is generated with results of all tests performed, which would include the moisture level measurements (see paragraph [0019] and figures 1-3). In fact, the warranty issued by the system of Skidmore, item 32 of figure 1, is depicted in the form of a certificate. The applicant has erroneously stated that the Skidmore disclosure has no disclosure of taking moisture content measurements. This is evidenced by the arguments on page 10 of the response whereby the applicant argues that Skidmore clearly fails to disclose or suggest that moisture measurement occurs. The applicant goes on to further state that Skidmore actually teaches away from one making measurements for moisture content on the interior of a structure. The examiner respectfully disagrees. The Skidmore reference discloses moisture measurements being taken as part of a home inspection. The examiner submits that one of ordinary skill in the art would be motivated to take moisture measurements around various parts of a home where moisture and mold issues are relevant. Paragraph {0019} specifically address tailoring the Skidmore system to make specific reports of interest related to mold and moisture issues. These uissues are most typically determined through making moisture content measurements. Further, paragraph [0020] describes the home inspection and discloses that measurements are made all over the inside and outside of the home, including interior inspection items to include information

concerning the rooms within the house, the floors, the walls, the ceilings, and the doors, and moisture penetration of the foundation. The applicant has even gone so far as to simplify and read things into the reference by stating that moisture penetration of the of the foundation would only be done by a visual inspection, without providing any evidence from the reference stating such. With this in mind, since Skidmore discloses making measurements to the interior of the structure, then one of ordinary skill in the art would know to make the measurements around all the particular points of interest, and thus Skidmore is of particular relevance to making such measurements for a home. How the applicant can argue that this inspection would not include moisture of the same area when that is considered a part of a standard home inspection is not clear to the examiner. Further, paragraph [0023] specifically discloses a determination performed by a home inspector of the compliance of various aspects of the home inspection, one of said aspects being moisture level measurements as disclosed earlier in paragraph [0019]. Again, as pointed out above, since the applicant is making no claims to providing any new or novel inspection method, then the points of the interior of the home would be understood to be measured for moisture content levels. With this in mind, the arguments against Skidmore alone are not persuasive. The examiner will not address the assertions concerning the lack of teachings or evidence in the Skidmore reference, since this is not the rejection that was made, and thus is not the issue on appeal. The issue on appeal is whether or not the rejection based upon Rynhart in view of Skidmore teaches or otherwise renders obvious the presently claimed invention. This issue has not even been addressed by the applicant at this time. In particular, the

applicant has requested a withdrawal of the rejection based on Skidmore. The examiner cannot withdraw a rejection based on Skidmore because there is not presently, nor has there even been in the history of the prosecution of this case any rejection based on solely Skidmore. Since the applicant has not requested a withdrawal of the rejection on Rynhart in view of Skidmore, then the examiner is left to assume that the rejection is valid.

Since the applicant at no time address the combination of references with any evidence as to why the combination of references (emphasis added) does not read on the presently claimed invention, then the issue under appeal, namely the rejection of all pending claims on Rynhart in view of Skidmore, has not even been addressed by the applicant and thus the examiner concludes that the applicant by not providing an argument to the combination of references agrees with the rejection based upon the combination of references, and would hope that the rejection would be maintained and affirmed and the claims remain rejected as above.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Rodney T. Frank/

Examiner, Art Unit 2856

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